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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re SUZANNE B. et al, Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Respondent, v. SCOTT B., Defendant and Appellant.	E041166 (Super.Ct.Nos. J196651, J196652, J203210) **OPINION**

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Affirmed in part and reversed in part with directions.

Joanne D. Willis Newton, under appointment by the Court of Appeal, for Defendant and Appellant.

Ruth E. Stringer, Acting County Counsel, W. Andrew Hartzell, Chief Deputy County Counsel, and Danielle E. Wuchenich, Deputy County Counsel, for Plaintiff and Respondent.

Lori A. Fields, under appointment by the Court of Appeal, for Minors.

Scott B. (Father) appeals from the juvenile court's order terminating his parental rights to two-year-old Suzanne, seven-year-old S.B., and one-year-old M.B. pursuant to Welfare and Institutions Code section 366.26.[1] On appeal, Father claims (1) the juvenile court abused its discretion in terminating his parental rights when he was precluded from asserting the exception to adoption found in section 366.26, subdivision (c)(1) "due to the unconstitutional suspension of his visitation rights," and (2) the notice requirements for complying with the provisions of the Indian Child Welfare Act (the ICWA) (25 U.S.C. § 1901 et seq.) were not satisfied, and therefore the court erred in finding that the ICWA did not apply. We agree that the notice provisions of the ICWA were not adequately complied with and will remand the matter for that limited purpose. We reject Father's remaining contention.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

Father and the children's mother (Mother) are an unmarried couple and are the biological parents of M.B. and Suzanne. Mother also has a son (S.B.) from a previous relationship. The family has had a long history of referrals to the San Bernardino County Department of Children's Services (DCS), including allegations of domestic violence, substance abuse, and mental illness. While in the hospital in premature labor with

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[1] All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

[2] The factual and procedural background is taken from this court's prior writ opinion in case No. E039626 up until the termination of reunification services unless otherwise indicated.

Suzanne, Mother tested positive for methamphetamine, and Father admitted to using methamphetamine. Later, at Suzanne's birth, Father came to the hospital with knives, and the police had to be called to remove him from the hospital due to his bizarre and aggressive behavior. In addition, Father attempted to abduct Suzanne. Hospital staff discovered Father trying to remove Suzanne's baby security abduction bracelet and identification bracelet several times. Despite his removal by law enforcement with an order to stay off of hospital premises, Father kept returning to the hospital. As a result, in August 2004, S.B. and Suzanne were removed from the parents' custody.

On August 10, 2004, DCS filed section 300 petitions on behalf of Suzanne and S.B. The court made no visitation order pending a further hearing.

At the August 13, 2004, contested detention hearing, Father testified that he was not S.B.'s biological father. However, he was later declared to be S.B.'s presumed father. Father denied any domestic abuse even when confronted with a police report. He did admit to removing Suzanne's security bracelet.

Minor's attorney agreed with DCS in recommending no visitation for Father. Counsel believed that DCS did not have sufficient resources should Father pose a security threat at the DCS office as he had at the hospital. Further, counsel did not believe that Mother could protect the baby from Father's bizarre behavior, since Mother "basically [did] what [Father] told her to.

The court found a prima facie showing and detained the children. Both parents were ordered to submit to random drug testing for controlled substances. The court ordered no parental visitation pending further court order. The court specifically asked

both parents if either of the children had Indian heritage. Both Mother and Father said no.

The jurisdictional/dispositional report summarized Mother's hospitalization, her and Father's failure to follow medical advice, their history of domestic violence and mental illness, and Father's bizarre behavior during the hospitalizations. The report requested that the court find that Mother and Father did not come under the provisions of the ICWA.

At a September 3, 2004, jurisdictional/dispositional hearing, Father requested a continuance so that he could retain private counsel, which the court granted. The court ordered weekly, supervised visitation for Mother, but Father's visitation remained suspended.

At a September 28, 2004, pretrial settlement conference, the court denied Father's request to have his court-appointed attorney relieved. Both parents also indicated they had Cherokee and Sioux Indian heritage, although they had previously denied such heritage.

In an addendum report, the social worker listed the recipients of the ICWA notices. DCS sent notice to the Bureau of Indian Affairs (BIA), 15 Sioux tribes, and three Cherokee tribes. The notices consisted of three documents: (1) a request for tribal membership information and tribal position form; (2) a letter from DCS addressed to "Dear Tribal Representative" dated October 1, 2004, containing information about the case; and (3) a notice of involuntary child custody proceedings for an Indian child (form SOC 820), which contained notice of the hearing scheduled for October 19, 2004.

The contested jurisdictional/dispositional hearing set for October 19, 2004, was continued at DCS's request to allow time for additional return receipts from the tribal notices to come in.

The record contains negative responses from each of the three federally recognized Cherokee tribes, indicating that neither Suzanne nor S.B. was an Indian child based on the information provided. In addition, there were negative responses from seven of the Sioux tribes indicating neither Suzanne nor S.B. was an Indian child and a response from another Sioux tribe indicating that S.B. was not an Indian child. Return receipts from 17 of the 19 tribes noticed and the BIA were also included in the record, indicating that the notices were received as early as October 6 and as late as October 18, 2004.

At a December 2, 2004, contested jurisdictional/dispositional hearing, Father and Mother waived their right to representation over the court's objection, and their counsel were relieved. The court then found the section 300 petitions on behalf of Suzanne and S.B. true based on allegations of drug abuse, mental health concerns, and domestic violence. Father and Mother declined the court's offer to reappoint counsel for them for future hearings. Additionally, at that hearing, DCS submitted its ICWA packet of tribal responses, and the court found that the ICWA requirements were satisfied and that the children were not Indian children. The court ordered Father to participate in reunification services and to undergo a psychological evaluation and modified his case plan to include general counseling with a licensed therapist. The court also ordered weekly supervised visitation for both parents and limited the visitation to parents only, clearly excluding

other relatives or any third party. The court then urged the parents to contact the social worker immediately to arrange visitation and begin working on their case plans.

On June 3, 2005, the social worker recommended that parental rights as to Suzanne and S.B. be terminated, as the parents had failed to participate in and complete their family reunification services. Additionally, the parents had continued to abuse methamphetamine and had repeatedly tested positive for drug use.

In February 2005, Mother and Father were evaluated by Dr. Nick Andonov. Mother presented herself as "highly submissive and dependent" on Father. After evaluating Father, Dr. Andonov found Father did not have any "significant cognitive deficits." Dr. Andonov diagnosed Father with an amphetamine-use disorder; amphetamine dependence with episodes of induced psychotic disorder while intoxicated and perpetual denial of use of amphetamines; poor impulse control with intermittent explosive disorder; obsessive-compulsive disorder; psychosocial and environmental problems; and grandiosity. Dr. Andonov therefore recommended that Father needed to "deal with reality and not live in fantasy" and that there was a "poor to guarded prognosis of the outcome" of his reunifying with his children. He recommended psychotherapy for Father. Father had refused to seek psychotherapy treatment or participate in substance abuse treatment.

Additionally, at a nonappearance review hearing on March 23, 2005, DCS asked the court to suspend parental visitation because of a possible kidnapping and inappropriate behavior. Father had arrived at a visit with an infant car seat "to take the baby home." He told the social worker, "[W]e are here to take our children home today[.]" In addition, S.B. became aggressive, angry, and started encopresis (fecal

soiling) after visits. He did not want to live with Father. The court suspended the parents' visitation with S.B. and Suzanne for a second time on April 5, 2005.

A criminal background investigation revealed Father had been arrested previously on drug-related charges. On July 15, 2003, Father was convicted of possession of a controlled substance and sentenced to one year of diversion. However, since that time, Father had not completed his court-mandated drug program or contacted his probation officer. Father also had been arrested for contempt and trespassing in December 2004 and for being under the influence of a controlled substance in June 2005.

Father admitted that he began using controlled substances when he was about 14 years old. He denied any mental health history but stated he had been diagnosed with attention deficient hyperactivity disorder (ADHD) and dementia. Father's medication for ADHD listed amphetamines as an ingredient, but Father refused to sign a release for DCS to contact his doctor regarding the prescription. Father later tested positive for amphetamines and methamphetamine.

Mother initially denied any domestic abuse between herself and Father. However, DCS discovered that a police report was filed in February 2004, after Father accused Mother of infidelity. According to the police report, Father stood over Mother and poked his index finger hard into her chest several times, raised his hand as if to strike her, and then kicked her in the leg. Mother told the police that he had hit her in the past. After the social worker confronted Mother with the police report, Mother admitted to the domestic abuse. Mother also admitted that in April 2005 she left Father due to his controlling and emotionally and physically abusive behavior. However, she returned to Father nine days later.

Mother also admitted that she and Father had used corporal punishment on S.B. The maternal grandmother observed a bruise on S.B.'s thigh, which S.B. claimed was caused by his being hit by Mother.

At a six-month review hearing on June 3, 2005, Mother and Father appeared via telephone. They requested the hearing be set contested and the court ordered the parents to return to court on July 5, 2005. Mother requested visitation, but the court informed Mother that the court had made a previous order finding visits detrimental to the children. The parents were ordered to contact the social worker for a copy of the report. At this hearing, Father did not raise the issues of visitation, lack of notice of the nonappearance review hearing, and the order that suspended the visitation.

In August 2005, the family again came to the attention of DCS when Mother delivered M.B. at home. M.B. was subsequently taken to the hospital. At the hospital, Father was very agitated, and the police had to be called once again. Due to the parents' history of drug use, domestic violence, mental illness, and failing to reunify with her siblings, M.B. was taken into custody.

On August 5, 2005, the parents' reunification services were terminated for Suzanne and S.B.; the court found visitation between the children and the parents detrimental and continued to suspend the visits. The social worker testified that the parents had failed to make contact with her in the previous three to four months, even though she had written them asking them to contact DCS; that Father had been arrested for being under the influence of a controlled substance and maintaining a place where controlled substances were used; and that neither parent had made any progress on their case plan. On that same day, a section 300 petition was filed on behalf of M.B. based on

Father's mental health issues and/or substance abuse, Mother's substance abuse, the parents' domestic violence history, and the parents' failure to reunify with M.B.'s siblings.

On August 8, 2005, DCS provided Father and Mother with referrals for counseling services for domestic violence, outpatient substance abuse, and parenting classes. Mother was also referred to a battered women's shelter. The parents acknowledged receiving the referrals, which they dated and signed on September 29, 2005. The social worker recommended that there be no visitation between the parents and M.B. due to Father's aggressive and unpredictable behavior and the social worker's concerns about M.B. being abducted.

At the August 8, 2005, detention hearing, Father called the court clerk's office and said he was having transportation difficulties. Father and Mother were therefore not present at that hearing. After being informed that Father failed to indicate whether the transportation problems would be resolved that day, the juvenile court (1) set a jurisdictional/dispositional hearing for August 29, 2005; (2) ordered no visitation between the parents and M.B.; (3) found that no family reunification services may apply; and (4) found that Father and Mother were representing themselves in the siblings' case.

On August 29, 2005, the date set for the jurisdictional/dispositional hearing, Father once again called the court and stated he had transportation problems and could not attend that day. The matter was continued to the following day for Father and Mother to be present and for counsel to be appointed for them.

On August 30, 2005, Father was present, and counsel was appointed for him. Mother was not present. The contested jurisdictional/dispositional hearing was set for

October 2005, and Father was ordered to drug test. Father tested positive for amphetamines.

At the September 23, 2005, pretrial settlement conference, an attorney was appointed to represent Mother, and the matter was continued to October 7, 2005, to allow Mother's attorney to review the case.

Father continued to demonstrate bizarre, irrational, aggressive, and threatening behavior. For example, on or about October 24, 2005, Father went to Teddy Bear Tymes Child Care (TBT) and informed TBT's director that he had just come from the juvenile court and "wanted to check out all the buildings on the property to see what was going on over there." When the director informed Father, who was not a TBT parent, that TBT is not associated with the court, Father began talking about his life story and about DCS taking M.B. away. He also stated how bad the juvenile court system and the lawyers were. The director advised Father to obtain a lawyer and then attempted to guide Father out of the building. However, when Father saw infants being wheeled in a buggy, he commented how he should "just go take" his children and made other inappropriate comments that made the director uneasy. He also hugged the director and stayed with her while a staff member wheeled the babies around in the buggy. After Father departed, the director called the juvenile court system and requested that a bailiff come over and make sure Father was off the grounds surrounding TBT. A bailiff soon arrived and questioned the director about Father's actions. The director was instructed to call the police. The police declined to take a report, however, because there was no probable cause Father might be a threat to TBT.

In a section 366.26 adoption assessment report filed October 21, 2005, the social worker recommended that parental rights be terminated and S.B. and Suzanne be freed for adoption. A prospective relative caretaker was willing to pursue legalizing the parental relationship with both children, who were appropriate ages for adoption. This relative was also caring for M.B. and was willing to adopt all three children.

The parents filed section 388 petitions on November 3, 2005, requesting that visitation with S.B., Suzanne, and M.B. be reinstated. They claimed that the "last orders were unjust, bias[ed] and a travesty of humanity." The petition further claimed that "the children/parent's [*sic*] are victims of these crimes against humanity." Additionally, the parents checked the box on the petitions indicating that the children "may be of Indian ancestry." The court denied the section 388 petitions on November 14, 2005.

On November 7, 2005, DCS sent form JV-135 notices to the BIA, the 15 Sioux tribes, and the three federally recognized Cherokee tribes. These notices related to the continued jurisdiction/disposition hearing set for December 12, 2005, in M.B.'s case and the February 1, 2006, section 366.26 hearing in S.B. and Suzanne's case. All return receipts were filed, as well as negative responses from 11 of the Sioux tribes, the BIA, and one of the Cherokee tribes. A packet of numerous return receipts and responses were also filed at the final segment of the section 366.26 hearing on August 14, 2006, relating back to the notices sent on November 7, 2005.

Following several continuances, the contested jurisdictional hearing as to M.B. was held on December 12, 2005. At that hearing, the court took judicial notice of documents relating to the disposition of the case pertaining to Suzanne and S.B. at DCS's request and over Father's counsel's objection.

The social worker thereafter testified regarding the allegations in the section 300 petition. She stated that in April 2005 Mother had contacted her and said that Father had been hitting Mother and that she had left him because of his emotional and physical abuse. The social worker confirmed that Mother left Father for about nine days and then returned to him. She also noted that the police had been called in once after Father had kicked Mother. The social worker noted that the allegations of Father's mental illness were based on Dr. Andonov's psychological evaluation. In regard to the allegations of substance abuse, the social worker testified that Father had tested positive for drug use on August 30, 2005, that he had tested positive on previous drug tests, and that he had been arrested for drug use. The social worker also noted that when Father arrived at the hospital after M.B. was taken there following her home birth, Father was very agitated, and security had to be called.

In relevant part, Father testified that he was prescribed Adderall and Desoxyn in approximately in 2000 and 2001 for attention deficit disorder and that those prescription drugs would result in a positive drug test for amphetamines and methamphetamine. He noted that the last time he saw a doctor was on September 23, 2004, over a year earlier, and that he had gotten a prescription for a month's worth of Adderall. He claimed that he got 100 tablets at a time, which he was supposed to take three times daily, but he did not take them that often. One month's supply generally lasted about three months. When questioned by the court, Father admitted that he previously had been arrested for possession of three baggies of methamphetamine and that he supplemented his medication with methamphetamine. Father also acknowledged that he had a pending criminal case for being under the influence of a controlled substance, which was set for

trial on December 2005. He also admitted that he previously had been convicted of possession of drugs in July 2003 and sent to a diversion program for one year, which he did not complete because, he claimed, the case was dismissed. He denied physically abusing Mother; he admitted being agitated at the hospital following M.B.'s birth but claimed it was because the hospital staff treated him like a criminal.

Following argument from counsel, the court found, based on the evidence submitted and observations of Father during trial, that Father had a mental illness as well as a substance abuse problem and was supplementing his medication. The court thus found the mental and/or substance abuse allegations in the petition true. The court also found the domestic abuse allegation true based on the evidence presented and the demeanor of Mother and Father during trial. The court pointed out that it was privy to watching Mother's reaction during the trial and it was obvious that she was codependent. The court also found the section 300, subdivision (j) allegation true (Father's failure to reunify with M.B.'s siblings).

After the contested jurisdictional hearing, the social worker gave the parents referrals for services. On December 19, 2005, Father was arrested for being under the influence of a controlled substance.

At the contested January 10, 2006, dispositional hearing, Father discussed his case at great length with the court. DCS requested that no services be given to the parents based on section 361.5, subdivision (b)(10) and due to the parents' failure to participate in their case plan despite being referred to services three times and Father's substance abuse charges. Father's counsel argued that Father was "eccentri[c]" and that services

provided to him should be "somewhat creative and inventive." His counsel therefore requested that the court grant Father at least six months of proper services.

Based on the evidence admitted into evidence and arguments of the parties, the court ordered no reunification services to the parents pursuant to section 361.5, subdivision (b). The court also ordered no visitation between the parents and M.B. as detrimental to the child pending the outcome of the section 366.26 hearing. In addition, the court found that the ICWA did not apply. The court ordered that M.B. be placed in a confidential concurrent planning home out of state.

At a nonappearance review hearing on January 10, 2006, DCS requested a change of placement for Suzanne, S.B., and M.B. DCS wished to place the children in their confidential relative concurrent planning home out of state. The court approved the change.

On January 20, 2006, DCS filed a section 366.26 report recommending that a 90-day continuance be granted for the hearing to establish a permanent plan of adoption for the children and to allow the children time to adjust to their new home. The report also noted that the children had not seen their parents since March 14, 2005, and had not asked to see their parents.

DCS filed an interim review report on February 3, 2006, requesting that a section 366.26 hearing be set to establish a permanent plan of adoption for M.B.

On February 6, 2006, Father filed a petition for extraordinary writ in M.B.'s case. In his writ petition, he did not raise any visitation issues. Rather, he claimed (1) the juvenile court erred in finding the jurisdictional allegations true in M.B.'s case, and (2) the juvenile court erred in allowing him to proceed in propria persona in M.B.'s siblings'

case. (See *Scott B. v. County of San Bernardino* (Mar. 22, 2006, E039626) [nonpub. opn.].) On March 22, 2006, this court denied Father's petition.

DCS filed a section 366.26 report dated May 10, 2006, recommending that parental rights be terminated and that M.B., Suzanne, and S.B. be freed for adoption by their concurrent placement family. The prospective adoptive family loved all three children and had provided a safe and structured home environment. The three children were content and happy in this placement.

Father testified at the August 14, 2006, section 366.26 hearing that he moved out of state to Arizona and was beginning a job in a hospital there. He objected to the termination of his parental rights because he felt that the reports had been fallacious and because he loved the children and they deserved to be with their mother and father. He never raised the parental benefit exception to the termination of parental rights or the visitation issue.

The court found by clear and convincing evidence that it was likely the three children would be adopted and terminated parental rights.

II

DISCUSSION

A. *Termination of Parental Rights*

Father claims the juvenile court violated his right to due process by failing to afford him sufficient visitation to establish the section 366.26 exception to the termination of parental rights. We disagree.

"Section 366.26, subdivision (c)(1)(A) authorizes the juvenile court to avoid the termination of parental rights to an adoptable child if it finds 'a compelling reason for

determining that termination would be detrimental to the child [because] . . . [t]he parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.'" (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424.) Father had the burden to show the statutory exception applied. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826-827.)

Neither Father nor Mother raised any issues related to insufficient visitation or suspension of visitation, even though they had many opportunities to do so. Father did not raise the suspension of visitation issue in his section 388 petition, in his writ petition, or at the section 366.26 hearing. At the section 366.26 hearing, Father, who was represented by counsel, did not raise any objections to the termination of parental rights or claim that the parental benefit exception to the termination of parental rights applied. He testified at the hearing, but his only objection to the termination of parental rights was that he thought the reports had been "fallacious" and because he loved the children and thought they should be with their mother and father. He did not object in the trial court that he had been denied visitation when the court suspended the visits after finding them to be detrimental to the children to establish the section 366.26, subdivision (c)(1)(A) exception to the termination of parental rights based upon a beneficial ongoing parental relationship.

This constitutes forfeiture of the issue on appeal. In *In re S.B.* (2004) 32 Cal.4th 1287, the California Supreme Court explained, "It is true that . . . a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.

[Citation.] [¶] Dependency matters are not exempt from this rule. [Citations.]" (*Id*. at p. 1293, fn. omitted.)

In *In re Dakota S.* (2000) 85 Cal.App.4th 494, the court noted, "'[A]ny other rule would permit a party to . . . deliberately stand by in silence and thereby permit the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable.'" (*Id*. at p. 502.)

Forfeiture of issues on appeal has been applied in dependency cases in a variety of different contexts. (See *In re Dakota S.*, *supra*, 85 Cal.App.4th at p. 502 and cases cited therein.) In *In re Kevin S.* (1996) 41 Cal.App.4th 882, the mother appealed an order establishing a legal guardianship pursuant to section 366.26. The mother was present in court with counsel when the juvenile court scheduled the section 366.26 hearing. The trial court found that the Department of Children and Family Services had not provided reasonable reunification services. The mother, however, did not object to the setting of section 366.26 hearing. (*Kevin S.*, at p. 885.)

The *Kevin S.* court concluded that the mother had forfeited the right to raise the issue of inadequate reunification services on appeal from the order establishing the legal guardianship by failing to object in the trial court. (*In re Kevin S.*, *supra*, 41 Cal.App.4th at p. 885; see also *In re Anthony P*. (1995) 39 Cal.App.4th 635, 640-642 [failure to raise issue of denial of visitation with sibling waived issue on appeal].)

Based upon the foregoing, Father forfeited the issue on appeal that he was denied visitation or sufficient visitation to establish the section 366.26, subdivision (c)(1)(A) exception to the termination of parental rights.

Moreover, to extent Father argues that the court erred in suspending visitation or that the court erred in suspending visitation without adequate notice, again we find Father waived or forfeited these issues. As noted above, Father did not object to the visitation order on these grounds. Fearing a possible kidnapping and a repeat of the bizarre behavior Father exhibited at the hospital when Suzanne was born, DCS requested suspension of Father's visitation at a nonappearance review hearing on March 23, 2005. The court ordered visits suspended on April 5, 2005. Father did not appeal this order or object to or challenge the order at subsequent hearings. On June 3, 2005, the parents appeared in propria persona at the six-month review hearing via telephone. At that telephonic hearing, the parents requested the hearing be set contested, and Mother requested visitation. The court then informed Mother that it had made a previous order finding visits detrimental. Since Father heard the interchange between the court and Mother, even if he did not know about the visitation suspension order prior to the March 23, 2005, hearing, he knew as of June 3, 2005. Hence, he had actual knowledge of the visitation order, and therefore he had an opportunity to object to the suspension after the June 3, 2005, hearing. He did not, nor did he raise the issue of inadequate notice. He failed to raise the issue at an August 5, 2005, contested six-month review hearing, even though he had an opportunity to do so. At the conclusion of that hearing, the court found that visitation was detrimental to the children's well-being. Later, Father filed a section 388 petition in November 2005, requesting that visitation be reinstated. However, after the court denied the petition, Father did not appeal from the order denying the petition. In addition, he had an opportunity to raise the visitation order when he filed his writ petition in M.B.'s case. Again, he did not.

As a result, pursuant to well-established authority repeatedly and consistently applying the waiver or forfeiture doctrine in dependency cases, we find Father forfeited the argument. (*In re Troy Z.* (1992) 3 Cal.4th 1170, 1181 [plea of no contest to § 300 petition foreclosed appellate challenge to sufficiency of the evidence]; *In re S.O.* (2002) 103 Cal.App.4th 453, 459, 460 [failure to raise issue of sufficiency of dependency petition]; *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 956, fn. 8 [adequacy of assessment report not raised below]; *Marlene M. v. Superior Court* (2000) 80 Cal.App.4th 1139, 1149 [mother waived lack of notice argument by failure to object]; *In re Levi U.* (2000) 78 Cal.App.4th 191, 201 [mother waived due process claim]; *In re Janee J.* (1999) 74 Cal.App.4th 198, 209-210 [mother waived lack of notice claim]; *In re Alexis W.* (1999) 71 Cal.App.4th 28, 36 [mother waived claim as to denial of section 388 petition when counsel agreed court could treat petition as trial brief and resolve in context of review hearing]; *In re Shelley J.* (1998) 68 Cal.App.4th 322, 328 [mother waived insufficiency of dependency petition allegations]; *In re Cynthia C.* (1997) 58 Cal.App.4th 1479, 1484, fn. 5 [objection to removal order waived by failure to challenge below]; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339 [father waived contention re lack of bonding study by failure to request]; *In re Daniel D.* (1994) 24 Cal.App.4th 1823, 1831 [by only seeking placement with herself in superior court, mother waived right on appeal to contend child should be placed with grandmother]; *In re Mark C.* (1992) 7 Cal.App.4th 433, 445-446 [father's failure to pursue issue waived claim expert psychological testimony should have been admitted at dispositional proceeding]; *In re Amos L.* (1981) 124 Cal.App.3d 1031, 1038 [no objection to inadequacy of social study]; *In re Heidi T.* (1978) 87 Cal.App.3d 864, 876 [failure to object in superior court waived issue of right to

separate counsel for minors]. Father forfeited his right to challenge the juvenile court's visitation order.

While application of the forfeiture rule is not automatic, this court's discretion whether to excuse the forfeiture is to be exercised "rarely and only in cases presenting an important legal issue." (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) In dependency cases, "the discretion must be exercised with special care . . . ." (*Ibid*.) In *S.B.*, the mother failed to object in the juvenile court, but on appeal challenged the visitation order which provided that the child's legal guardians make all decisions concerning the mother's visits with her child. The Supreme Court determined that the Court of Appeal did not abuse its discretion in entertaining the mother's challenge, notwithstanding her failure to object below, because the issue of whether a juvenile court in a dependency case may delegate to the child's legal guardian the authority to decide whether a parent may visit the child was an important issue of law that had divided the Courts of Appeal at that time. (*Id*. at pp. 1292-1294.)

We do not find Father's claim here on a par with that addressed in *In re S.B.* Whether a juvenile court may suspend visitation between parent and child, while important, is not a new issue or one dividing the Courts of Appeal.

B. *The ICWA*

Father contends, and DCS concedes, that the ICWA was violated because the ICWA notice requirements were not satisfied. Specifically, Father claims that the court's finding that the ICWA did not apply was erroneous because the notices provided to the Cherokee and Sioux tribes were deficient.

Under the ICWA, when a child subject to a dependency proceeding is or might be an Indian child, as that term is defined in the act, each tribe of which the child might be a member or eligible for membership must be notified of the dependency proceeding and of the tribe's right to intervene in the proceeding. If the identity of the tribe cannot be determined, notice must be sent to the Secretary of the Interior through the BIA. (25 U.S.C. § 1912; Cal. Rules of Court, rule 5.664(f) (formerly rule 1439(f)[3]).) If proper notice under the ICWA is not given, the child, the parent, or the tribe may petition the court to invalidate the proceeding. (25 U.S.C. § 1914; rule 5.664(n).) Moreover, it is up to the party seeking to terminate parental rights to notify the BIA or the tribe in order to determine the child's ICWA eligibility. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 734-735.)

The duty to give notice initially arises only "where the court knows or has reason to know that an Indian child is involved" in the proceeding. (25 U.S.C. § 1912(a); see also rule 5.664(e).) It is uncontested here that the court had the duty here to give ICWA notice. The issue before us is whether the notice given was adequate.

The notice must include all required information, including the child's name, date of birth, and place of birth and the names and addresses of the child's parents, grandparents, and great-grandparents, along with dates of birth or death and/or other identifying information. A copy of the dependency petition must also be provided. (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630; see also *In re S.M.* (2004) 118 Cal.App.4th

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[3] Effective January 1, 2007, the California Rules of Court were reorganized and renumbered. We refer to all rules by their current number. All further reference to rules are to the California Rules of Court.

1108, 1116.) It is the agency's responsibility to obtain as much information as possible about the child's potential Indian background and to provide that information to the relevant tribe or, if the name of the tribe is not known, to the BIA. (*Louis S.*, at p. 630; see also *S.M.* at p. 1116.) Failure to provide notice in a manner consistent with the ICWA mandates reversal. (*Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404, 416; *In re Junious M.* (1983) 144 Cal.App.3d 786, 796.)

As previously noted, DCS did give notice in this case several times after both parents claimed Native American ancestry. At a pretrial settlement conference on September 28, 2004, Mother stated that she had Cherokee and Sioux ancestry through her great-grandmother, Gladys T., who she said was "full[-]blooded Indian." Father reported that he was still in the process of researching his history but that his Indian ancestry was Cherokee and stemmed from his great-great-grandmother.

The main issue here is whether the ICWA notices were adequate even though, among other errors, they did not include the names of the children's maternal great-grandmother, Gladys T. and her descendents, or the children's paternal great-great-grandmother and her descendents. In other words, we must decide whether DCS substantially complied with the requirements of the ICWA. We have no alternative but to conclude that it did not.

The notice of the October 19, 2004, hearing in Suzanne and S.B.'s case did not contain certain available information. There were two separate forms attached to the October 19 addendum report, one for Suzanne and one for S.B. The notice form for Suzanne did not contain either parent's birthplace or date of birth, although the birthdates were included on the separate request for tribal membership information. Further, the

notice form for Suzanne incorrectly listed the maternal great-grandmother, Gladys T., as the *paternal* great-grandmother. It failed to include Father's actual great-great-grandmother. The notice form for S.B. failed to list Gladys T. at all.[4] Moreover, no information in the notices was provided as to the maternal or paternal grandparents. The notices indicated that the children had Cherokee and/or Sioux heritage, but neither the parents' nor the grandparents' specific ancestry was indicated.

Likewise, the notices sent concerning the December 12, 2005, hearing in M.B.'s case, and the February 1, 2006, hearing in Suzanne and S.B.'s cases, did not contain either parent's birthplace, nor did they indicate Father's Cherokee ancestry or any other Indian ancestry. Rather, under the field where Father's tribal affiliation should have been listed, the social worker noted "N/A." Additionally, there was no information about the grandparents or great-grandparents.

The purpose of the ICWA notice requirement is to advise the tribe of the pending dependency proceeding and afford the tribe an opportunity to intervene if it determines the child who is the subject of that proceeding is an Indian child. (*In re S.M.*, *supra*, 118 Cal.App.4th at pp. 1115-1116; 25 U.S.C. § 1912(a).) A tribe cannot decide whether to intervene unless it can tell whether the child is a member or eligible to be a member. Therefore, substantial compliance also requires that the notice include any specified

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[4] S.B.'s form did not include information regarding Father's great-great-grandmother, either; however, Father was admittedly not S.B.'s biological father. For purposes of the ICWA, an "Indian child" is a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe *and is the biological child* of a member of an Indian tribe. (25 U. S.C. § 1903(4), italics added.) Insofar as S.B. is concerned, we do not decide the issue of adequacy of the notices based on the lack of paternal information but only take into consideration the lack of maternal information.

information reasonably necessary to determine the child's membership status. (See, e.g., *S.M.*, at pp. 1116-1117 [because notice contained no information about child's purported Indian grandmother and great-grandmother, tribes could not conduct a meaningful search]; *In re Louis S., supra,* 117 Cal.App.4th at p. 631 [due to misspellings and omissions in notice, "the tribe could not conduct a meaningful search to determine [the child's] tribal heritage"].)

In *Louis S.*, the court found the tribe could not conduct a meaningful search to determine the child's tribal heritage because the SOC 318 form, among other errors, did not provide birthdates for the maternal grandmother or maternal great-grandmother. The court noted the maternal grandmother's birth date was available because the children were in foster care with her. The court also found fault with the omission of the maternal great-grandmother's full name and birth date because there was no evidence the social worker was unable to get this "critically important" information about the person with the alleged Indian heritage. (*In re Louis S., supra,* 117 Cal.App.4th at p. 631.) "Notice is meaningless if . . . insufficient information is presented to the tribe" asked to determine if a child is an Indian child. (*Id*. at p. 630.)

The notices here do not contain the name of the children's maternal great-grandmother, Gladys T., or the parental great-great-grandmother, even though DCS was aware of such information as early as September 2004. We also note that the social worker was in contact with the maternal grandmother early in the case, as well as other maternal relatives, and could have obtained information from those relatives concerning Gladys T.'s birthplace and birth date. Similarly, there is no indication that the social worker was unable to get information pertaining to Father's ancestry. The social

worker's failure to obtain any such available information was a dereliction of the duty to fully inquire about all information concerning a child's family history. (*In re S.M.*, *supra,* 118 Cal.App.4th at p. 1116.)

In short, as it concedes, DCS did not substantially comply with the ICWA's notice requirements because it did not supply the Indian tribes with *all available* information. (See *In re Louis S.*, *supra*, 117 Cal.App.4th at p. 630.) On this record, we cannot find DCS substantially complied with the ICWA's notice requirements and will remand the matter. DCS is to provide the juvenile court with complete copies of the required ICWA notices that it sends, along with return receipts for these notices and all responses received from the tribes and the BIA.

III

DISPOSITION

The orders entered at the section 366.26 hearing are reversed. We order a limited remand, as follows.

The juvenile court is directed to order the Department to give notice to all three Cherokee tribes, all Sioux tribes, and the BIA in compliance with the ICWA and related federal and state law. Once the juvenile court finds that there has been substantial compliance with the notice requirements of the ICWA, it shall make a finding with respect to whether the children are Indian children. (See rule 5.664(g)(5).) If at any time within 60 days after notice has been given there is a determinative response that the children are or are not Indian children, the juvenile court shall find in accordance with the response. If there is no such response, the juvenile court shall find that the children are not Indian children. (Rule 5.664(f)(6), (g)(1), (g)(4).) If the juvenile court finds that the

children are not Indian children, it shall reinstate the original orders entered after the section 366.26 hearing. If the juvenile court finds that the children are Indian children, it shall set a new section 366.26 hearing and conduct all further proceedings in compliance with the ICWA and related federal and state law.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

McKINSTER
J.

MILLER
J.